

## APPENDIX C

LEGAL REQUESTS FOR RECORDS - The Department receives requests for records by means other than the Public Records Act. Parties to a legal action may compel production of Department records through use of a number of legal mechanisms. These requests will occur in two situations: (1) where the Department is not a party to the legal action, and (2) where the Department is a party to the legal action. Where the Department is not a party to the legal action the Department will most frequently receive a demand to produce documents by virtue of a **subpoena duces tecum**. Where the Department is a party to the legal action the Department may receive a **subpoena duces tecum**, a **request to produce and inspect documents** or a **notice of deposition and production of documents**.

1. **SUBPOENA DUCES TECUM** - A subpoena duces tecum is an order issued by the court which requires production of documents at a particular time and place. Attached to the subpoena duces tecum is an affidavit which specifies the documents which are being required to be produced. A subpoena duces tecum may require that the specified records be produced for copying by a copy service retained by the party requesting the records, may require the records be produced for trial, may require that the custodian of the records appear for a deposition with the records or may require some other person to appear for a deposition with the records. When a subpoena duces tecum requires production of records to a copy service it usually requires an affidavit from the custodian of records that the records produced are those that have been requested. Normally a form affidavit is attached to the subpoena duces tecum. Failure to produce the records by the date stated on the subpoena duces tecum can be punished by contempt of court and levying of fines.
2. **DEPOSITION** - A deposition is an oral interrogation of a witness under oath before a court reporter. A person may be compelled to attend a deposition by a subpoena or a notice of deposition. A witness who fails to appear for a deposition at the appointed time and place may be found in contempt of court, fined or otherwise sanctioned by the court. **DEPARTMENT STAFF WHO ARE SERVED WITH A SUBPOENA DUCES TECUM OR NOTICE OF DEPOSITION WHICH REQUIRES APPEARANCE AT A DEPOSITION SHOULD IMMEDIATELY CONSULT WITH THE OFFICE OF LEGAL COUNSEL.**
3. **REQUEST TO PRODUCE AND INSPECT DOCUMENTS** - This legal mechanism is similar to a subpoena duces tecum except that it can only be served on the Department when it is a party to the legal action. The request to produce

compels the inspection and copying of the records or other things identified in the request to produce.

RESPONDING TO LEGAL REQUESTS FOR RECORDS - The Department must respond to legal requests for records by the date stated on the legal request. DEPARTMENT STAFF MUST REFER ALL LEGAL REQUESTS FOR RECORDS TO THE OFFICE OF LEGAL COUNSEL WHERE THE DEPARTMENT IS A PARTY TO THE LEGAL ACTION. Where the Department is not a party to the legal action, the Office of Legal Counsel must be contacted for guidance or advice in responding to the legal request. It is the responsibility of the Office of Legal Counsel to coordinate the response to a subpoena duces tecum where the Department is a party to the action in which the subpoena has been served. The PRC in conjunction with program staff may be required to assist with assembling and reviewing the records to be produced pursuant to the subpoena duces tecum. The Public Records Act and FOIA exemptions do not directly apply to legal requests for records. However, all of the privileges which have been incorporated into the Public Records Act and FOIA exemptions also apply to legal requests for records. They include:

- a. ATTORNEY-CLIENT PRIVILEGE
- b. ATTORNEY WORK PRODUCT PRIVILEGE
- c. TRADE SECRETS
- d. OFFICIAL INFORMATION
- e. IDENTITY OF INFORMER
- f. PERSONAL PRIVACY PRIVILEGE
- g. DELIBERATIVE PROCESS PRIVILEGE

There are other privileges which may apply to protect a particular record from disclosure. Department staff should consult the Office of Legal Counsel where there is a question regarding whether or not a particular record is privileged from disclosure. THE OFFICE OF LEGAL COUNSEL MUST BE CONSULTED WHEN A LEGAL REQUEST FOR RECORDS DEMANDS PRODUCTION OF RECORDS WHICH ARE PRIVILEGED. The procedure required to protect privileged records from disclosure is different for legal requests than it is for a public record act or FOIA request. Therefore, any response made to a legal request where privileged documents are withheld by the Department must be made in consultation with the Office of Legal Counsel.

#### FEES IN RESPONDING TO LEGAL REQUESTS FOR RECORDS

Subpoena Duces Tecum - The Department may charge a party for the Department's reasonable costs in responding to a state subpoena



duces tecum where the subpoena requires the production of a copy of the Department's business records to a clerk of the court, judge, etc. Reasonable costs include:

- copy charge of \$.10 per page for a standard 8 1/2 x 14" paper or less
- copy charge of \$.20 per page for microfilm
- actual costs of reproducing oversized documents
- reasonable clerical costs for locating and making the records available at a rate of \$16. per hour, computed on the basis of \$4. per quarter hour or any fraction thereof
- actual postal charges.

The Department may demand payment of its reasonable cost simultaneously with delivery of the records. Where the subpoena duces tecum requests that the records be delivered to the attorney or a representative of the attorney for copying, the fee which can be charged by the Department shall not exceed \$15. (Evidence Code §1563.)

\* Deposition Subpoena and Duces Tecum - If the state subpoena requires production of the documents at a deposition or trial the witness is entitled to a witness fee of \$35. per day and mileage to and from the deposition at \$.20 a mile. Government Code §68093. Where a Department employee is subpoenaed to testify in a matter in which he or she has expertise gained in the course of his or her duties, the Department is entitled to receive the salary which the witness is normally entitled to receive. The person serving the subpoena is required to tender with the subpoena the sum of \$150. for each day that testimony is required. If the actual expenses should prove to be more or less than the sum tendered, the Department is to be paid the sum remaining, or refund the excess. (Government Code §68097, 68097.2.)

A federal subpoena which requires the production of records at a deposition or trial requires payment of a witness fee of \$40. for each day and mileage to and from the deposition. (Federal Rules of Civil Procedure (b) (1); 28 U.S.C. Section 1821.)